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IN THE

Supreme Court of the United States

No. 75-2781

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Intervenor-Petitioner,

v.

MICHAEL C. McCRARY, INFANT BY CURTIS L. McCRARY AND SANDRA McCRARY AND COLIN M. GONZALES, INFANT BY RAYMOND GONZALES AND MARGARET R. GONZALES,
Plaintiffs-Respondents,

and

RUSSELL L. RUNYON, KATHERYNE E. RUNYON,
Defendants (Petitioners in No. 75-62)

Petition for Writ of Certiorari
To The
United States Court of Appeals
For The Fourth Circuit

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Petition for Writ of Certiorari
To The
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For The Fourth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in its cases No. 73-2348, No. 73-2349 and 73-2350 (consolidated with cases No. 73-2351 and No. 73-2352 on trial and appeal).

OPINIONS BELOW

The opinions of the Fourth Circuit Court of Appeals sitting *en banc* together with the opinion on rehearing are reported at 515 F.2d 1082 (App. 1a). The opinion of the United States District Court for the Eastern District of Virginia, Alexandria Div. (Bryan, J.) is reported at 363 F.Supp. 1200, (App. 35a).

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1975. Rehearing applications by this petitioner and others were denied with opinion by order made May 26, 1975 and entered May 29, 1975. The jurisdiction of this Court arises under 28 U.S.C. §1254(1).

The Court of Appeals, pursuant to 28 U.S.C. § 2403, has certified to the Attorney General that the constitutionality of 42 U.S.C. § 1981 has been drawn in question.

Petitions for certiorari raising the same or closely related issues have been filed in this Court by the defendants in this case (No. 75-62); by the defendants in the consolidated case (No. 75-66); and will be filed in *Cook v. Hudson*, (No. _____), the last on behalf of teachers having public school contracts terminated after sending their own children to private white schools. A possibly related issue is raised in No. 74-1568 *(Wind River Indian Education Ass'n v. Ward)*.

A related issue will be argued *en banc* before the Fifth Circuit on or about September 16, 1975, *Riley v. Adirondack Southern School For Girls* (No. 74-1976) and could be consolidated for argument with *Brown v. Dade Christian Schools*, now on appeal to that Court (No 75-3260) from a decision of the United States District Court in Florida which followed the majority opinion in this case.

QUESTION PRESENTED FOR REVIEW

The statement of the issue as concurred in by all judges of the Fourth Circuit, was as follows:

> The issue in this case is whether 42 U.S.C.A. § 1981 prohibits private schools from denying admission to qualified black applicants solely on the basis of their race.

STATUTES

United States Constitution, First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Thirteenth Amendment

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

42 U.S.C. § 1981. *Equal rights under the law.*

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and

> enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Two Negro minors by their parents as plaintiffs in the District Court, asserted an appropriate level of scholastic competence and sought declaratory and injunctive relief for a refusal to admit them on the grounds of their race to defendants' allegedly white private school in Arlington (4).[1] The complaint alleged and defendants denied that admission to any private school facility is a "contract" within the meaning of the Civil Rights Act of 1866 (42 U.S.C. § 1981) and argued that such a racial admission limitation was therefore a denial to them and their class of the same right "to make and enforce contracts . . . as is enjoyed by white citizens" under § 1981 and violated their right to equal enjoyment of "places of public accommodation" (7).

This petitioner (SISA), is an association of six Southeastern non-profit state private school organizations which have memberships which include a substantial number of private schools which concededly have racial limitations on admission. Neither the school operated by defendants nor the school involved in a companion case tried with

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[1] Plain number references are to pages of Part I of the Joint Appendix filed in the Court of Appeals and forwarded in printed form to this Court under Rule 21(2).

it, are members of SISA or of its component state associations.

SISA was granted intervention below as an individual and class defendant (13). In its answer to the complaint, SISA denied that the infant plaintiffs were granted a right by § 1981 or otherwise to invoke judicial assistance to compel their admission to any private school of their choice (14). By counterclaim which plaintiffs denied, SISA alleged that its schools were in fact privately owned and maintained, were academically advanced over public education and prayed for a counter-declaration affirming the constitutional right of the parents of its students to express their educational opinions by selecting any private school for their children which conformed to their preferences – whether or not its admission policy was such as to exclude one or more constitutionally significant classes of applicants (15).

In proof of its factual allegations, SISA stipulated with plaintiffs as follows (17):

> 1. A substantial proportion of the schools represented by intervenor deny admission to applicants of the Negro race.
>
> 2. The schools represented by intervenor admit applicants only in the discretion of the school authorities.
>
> 3. The schools represented by intervenor are privately owned, financially supported by tuition paid by the parents of the students and, in some cases, supplementary private gifts.
>
> 4. The schools represented by intervenors are located in areas having cost-free, desegregated

> public education available to all children, and the parents of the students in schools represented by intervenor are taxpayers who pay their proportionate share of federal, state and local taxes for the maintenance of such public system of education.
>
> 5. The sole basis of jurisdiction asserted by plaintiffs in this action is 42 U.S.C. § 1981.

In proof of the balance of its allegations SISA introduced uncontradicted evidence before the trial court, to show (a) that as a result of its use of limited admission policies, its private schools had achieved demonstrably higher academic results and have had fewer disciplinary problems than the public schools of their area (33, 54) and (b) that on the basis of these scholastic records and in the light of the controversial state of scientific opinion about educational methods (43-51), the choice of a limited admission private school could not be said to be so irrational as to deny the parents a judicial declaration of their constitutional right to so associate their children for the practical expression of their educational beliefs.

On July 27, 1973, after trial, the District Court found as a fact that the defendants' school had excluded the infant plaintiffs some three years earlier by reason of their race (App. 38a, 39a). The court noted that the infant plaintiffs had since been admitted to other private schools of their choice and were making satisfactory progress (App. 38a).

On the law, the Court ruled that the 42 U.S.C. § 1981 applied to private as well as state-enforced discrimination, that the defendant school was not "truly private" since it was "open to every white child," and therefore that a right of admission to a white private school was a right

to "contract" within the intendment of § 1981. The Court also held that since § 1981 was limited in terms to rights ". . . enjoyed by white citizens," its prohibitions were not applicable to non-white races or to private all-Negro, all-Chinese or rabbinical schools (App. 41a). The Court denied class representation either by plaintiffs or SISA (App. 40a).

In its order the Court granted the requested declaration of right that racial discrimination in private school admissions violates § 1981 (App. 43a). It held SISA's evidence of the scholastic value of limited admission schools to be irrelevant under *Brown v. Board of Education* (App. 42a) and dismissed intervenor's counterclaim for failure to state a cause of action (App. 45a).

Upon its opinion the District Court issued an injunction against the school of defendants and all private schools associated with SISA to prohibit any further denial of admission to Negro applicants (App. 43a). Damages were awarded (App. 44a) and supplemental orders were later entered (App. 45a) (71).

An appeal was taken by SISA from the District Court's dismissal of its counterclaim and its correlative declaration of a statutory right in the Negro plaintiffs to compel admission to private white schools.

The appeal was heard *en banc* on April 2, 1974. The decision of the Fourth Circuit was issued on April 15, 1975. Four of the seven judges affirmed the holding of the District Court, citing this Court's rulings in *Jones v. Mayer*, 392 U.S. 409 (1968), *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) and *Tillman v. Wheaton-Haven Recreation Ass'n.*, 410 U.S. 431 (1973). The opinion denied that the question had been considered here in *Norwood v. Harrison*, 413 U.S. 455 (1973). The opinion concluded

> Nothing in § 1981 impedes parents in their exercise of a choice of a private school presenting ideas or having educational methods or practices which are not available in the public schools. They may do the same thing to avoid ideas and influences in the public schools which they regard as unhealthy. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Among private schools, they are free to prefer one with a certain curriculum or dogma over others, but the school, while it may exclude applicants on the basis of neutral principles, may not exclude on the basis of race.
>
> 515 F.2d at 1087-88 (App. 11a).

Three Circuit judges, accepting the issue as defined by the majority, dissented from their holding on the ground that the question was "one of first instance in any federal court at this or higher level," (App. 21a-22a) that *Jones*, *Sullivan*, and *Tillman* were not controlling since they dealt with rights in real property under § 1982, and that the right to make contracts "does not imply a right to coerce an unwilling co-contractor into making any and every variety of contract." (App. 22a). The dissenters further argued that the applicable policy was one of associational right as set out by this Court in *"Moose Lodge v. Irvis*, 407 U.S. 163 (1972), and *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974)" (App. 23a) concluding:

> As we have previously indicated, we do not find it necessary to express an opinion on the constitutional validity of 42 U.S.C. § 1981, but we do feel compelled to say that the result reached by the majority is an unconstitutional and invalid application of the statute. Our conclusion is supported by the opinion of the court in *Gilmore v. City of Montgomery*, 417 U.S.

> 556 (1974), which adopts, in the opinion of the court, the language we have previously quoted from the dissenting opinion of Mr. Justice Douglas in *Moose Lodge* to the effect that people may band together in their association with whomsoever they please. And those cases specifically refer to the forbidden and highly suspect classifications of race and religion. Nothing in history or the precedents contains any suggestion that the same reasoning applied to a religious school in *Pierce*, to a social club in *Moose Lodge*, and indeed (albeit in slightly different context) to private schools in *Gilmore*, should not apply here. And we think the majority takes too little account of *Norwood v. Harrison*, for in that case, in a discussion of the precise type of segregated private school involved here, the court unequivocally stated that the very bias here charged is neither invalid nor subject to sanction of law:
>
> > "Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State." 413 U.S. 455, 469.
>
> 515 F.2d at 1096-97 (App. 30a-31a).

A stay pending certiorari was granted by the Circuit Court. Intervenor here prays the issuance of a writ of certiorari to review the judgment of the Fourth Circuit denying its private schools the right of limiting admissions by race.

REASONS FOR GRANTING THE WRIT

I

THE ISSUE IS ONE OF MAJOR CONSTITUTIONAL IMPORTANCE AND IS DIRECTLY PRESENTED FOR RESOLUTION ON THIS RECORD

In holding that 42 U.S.C. § 1981 requires the compulsory admission of black applicants to private white schools, the decision below has created a constitutional conflict between the First Amendment rights of parents under the *Pierce* doctrine, and the Thirteenth Amendment right of blacks to be free from private discrimination amounting to an incident or badge of slavery.

The *Pierce* doctrine was summarized in *Norwood* (p. 462) as

> . . . the constitutionally protected choice [of parents] to send the children to private [white] schools.

Both opinions below accept this rule as

> . . . a form of exercising freedom of association protected by the First Amendment.
>
> *Norwood*, p. 470.

and agree that as a general proposition parents may send their children to any private school which expresses their educational beliefs. (App. 11a, App. 26a).

The character of that belief in the case of the parents whose children attend the schools of intervenor was stated in *Norwood* to be (p. 469),

> ". . . that segregation is desirable in education."

But, as the majority below has further held, this is the one private belief that is not permitted to be expressed in any corresponding private school because segregation in education is a form of private bias which this Court in *Jones, Sullivan,* and *Tillman* is said to have held to be prohibited by Congress when it exercised its Thirteenth Amendment authority by the enactment of the predecessor to 42 U.S.C. § 1981.

Intervenor denies that this Court has so ruled or that such a conclusion is required by those opinions, and adds first, that the holding sought to be reviewed violates the intendment of Congress in its enactment of the predecessor 1866 Act, and second, that the Circuit has thereby created a constitutional conflict which did not previously, and, in the opinion of intervenor does not now, exist.

The issue is ripe for decision on this record. The question now posed is solely one of law. On the face of the trial record, there are no open questions of fact as to the schools of intervenor. They are each concededly private non-profit institutions supported by tuition and gifts. They are located in areas having locally available desegregated public schools.[2] They select their pupils in their own individual discretion, and they meet all state educational requirements. Their parents pay private tuition in addition to taxes which support the local integrated public schools. By limiting their admissions to a single constitutionally significant class they have achieved a higher

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[2] Plus 138 private racially integrated schools (Fourth Circuit brief *amicus* of Council for American Private Education, p. 2) said to be located "in the same area of the country as the schools which are affiliated in the Intervenor." (p. 13)

academic result and have fewer disciplinary problems than do the public schools in their areas.[3]

The existence of any conflicting constitutional rights of the parties is therefore directly presented by this record and its determination by this Court will assist in defining the extent to which any citizen retains an educational choice.

II

THE DECISIONS OF THIS COURT HAVE BEEN MISREAD. THEY DO NOT REQUIRE THE "CONTRACT" PHRASE OF § 1981 TO BE EXTENDED TO RACIAL DISCRIMINATION IN PRIVATE SCHOOL ADMISSIONS

Admittedly, the precise question has never previously been answered. In 1968 in *Jones v. Mayer*, you held that Section 1 of the 1866 Act was intended by Congress to prohibit certain forms of private discrimination which constituted badges or incidents of slavery within the meaning of the Thirteenth Amendment. That interpretation was restated in your *Sullivan* and *Tillman* decisions. The courts below now hold that those three decisions require blacks to be admitted to white private schools (App. 40a).

> If read literally the act covers these plaintiffs, who have been denied their right to make a contract with the defendants because they are not white. That it is to be read literally is no longer open to question. In considering

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[3] This last sentence was held to be irrelevant under *Brown v. Board of Education* (App. 42a). But *Brown* not only held that it was solely concerned with public education but that it was peculiarly the sanction of official action by the states which made segregated schooling psychologically detrimental to blacks, 347 U.S. 483, 493 (1954).

> 42 U.S.C. § 1982, the Supreme Court has said that ". . . Congress meant exactly what it said." *Jones v. Mayer Co.*, 392 U.S. 409, 422 (1968). Interrelated as § 1981 and § 1982 are, there is no reason to think Congress meant any less when it enacted § 1981. *Tillman v. Wheaton-Haven Recreation Ass'n.*, 410 U.S. 431 (1973). The purpose of both is to prohibit all racial discrimination against non-whites, whether that infringement be "by 'State or local law,'" or "by 'custom, or prejudice.'" *Jones v. Mayer Co., supra*, at 423. In other words, no state action is necessary to invoke § 1981.
>
> (District Court opinion, App. 39a-40a).

> As an intellectual exercise, the historical reading and interpretation of the majority in *Jones v. Mayer* may be debatable . . . . That reading and interpretation was followed in *Sullivan v. Little Hunting Park* and in *Tillman v. Wheaton-Haven*, however, and for us, is firmly established.
>
> (Court of Appeals opinion, App. 9a)

But intervenor says this result is not mandated by your holdings in those three decisions for at least three reasons. First, they were each specifically concerned with the scope of the right to purchase property under § 1982, a well-known problem of slavery. They did not deal with "contracts" under § 1981. Second, while *Jones* and *Tillman* arguably concur that some forms of private discrimination would be prohibited by § 1981, the circumstances under which it would be so extended were left open for further consideration. Third, which intervenor does not here argue, the decisions of this Court and others indicate that

the presence of First Amendment rights in opposition are a limiting factor on legislative interpretation as are the subject matters of modern Civil Rights legislation against private discrimination.

1. *The Courts Below Misread Jones, Sullivan and Tillman. These were Rulings on § 1982 only.*

In *Jones v. Mayer* this Court took note that only state-supported discrimination was prohibited by the Fourteenth Amendment and therefore any applicability of the 1866 Act against private bias had to depend on such discrimination being established as a badge or incident of slavery within the scope of the constitutional delegation of authority given to Congress in the second paragraph of the Thirteenth Amendment. On a review of the legislative history of the 1866 Act, this Court concluded that § 1982 had been originally intended by Congress to prohibit private racial bias burdening transfers of real property and this view has since been uniformly applied, *Sullivan v. Little Hunting Park, Inc., supra.*

Intervenor says that the same limitation is equally true as to this Court's *Tillman* opinion. The complaint in that case did cite § 1981 as well as § 1982, and possibly for that reason both judgments below specifically rely on *Tillman* as compelling a broad interpretation of the "contract" clause of § 1981. But that was not the holding of this Court. On its facts, *Tillman* was a § 1982 case and dealt – as did *Jones* and *Sullivan* – with the extent of rights acquired under a real property transfer,

> When an organization links membership benefits to residency in a narrow geographical area,

> that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area.
>
> . . .
>
> We hold, as a consequence, that *Wheaton-Haven* is not a private club and that it is not necessary in this case to consider the issue of any implied limitation of the sweep of § 1982 when its application to a truly private club, within the meaning of § 2000a(e), is under consideration. Cf. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d. 627 (1972); *Daniel v. Paul*, 395 U.S. 298, 89 S.Ct. 1697, 23 L.Ed.2d 318 (1969).
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> 410 U.S. 437, 438-9, 93 S.Ct., 1090, 1094 (1973).

And on remand, the District judge confirmed that the action taken by the Court in *Tillman* was a reading of § 1982, 367 F.Supp. 860 (D. Md. 1973). *Accord, Riley v. Adirondack Southern School for Girls*, 368 F.Supp. 392, 396-7 (M.D. Fla. 1973)

Jones, Sullivan, and *Tillman* are therefore not precedents on the scope of the application of § 1981 to private discrimination in the making and enforcement of contracts.

2. *Only Such "Contracts" as to Which Private Discrimination Would Constitute a "Badge or Incident of Slavery" are Within the Ambit of § 1981.*

This Court noted in *Jones* that §§ 1981 and 1982 were not enacted in the usual course of legislation. Since "the Constitution does not proscribe private bias" (*Norwood*, p. 469) the power of Congress to legislate against an

individual's discrimination by race, sex, or religion must be traceable to some constitutional delegation of specific legislative authority. For example, the anti-discrimination provisions of the 1964 Civil Rights Act were shown to be an exercise of the power of Congress over interstate commerce, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and justified as a codification of "the common-law inn-keeper rule which long pre-dated the Thirteenth Amendment," (p. 261). The similar provisions in Section 1 of the 1866 Civil Rights Act on the other hand were sustained by reference to the constitutional delegation under the second paragraph of the Thirteenth Amendment, which, as this Court put it, authorized Congress to legislate against such examples of private bias as had theretofore constituted a badge or incident of slavery, *Civil Rights Cases*, 109 U.S. 3 (1883).

The inability to make an enforceable contract, shared before 1866 by slaves, minors and incompetents, was eliminated as to former slaves by § 1 of the 1866 Act – now in part § 1981. But this was the removal of a legal disqualification of the newly freed citizens, not the grant of an affirmative and preferential right, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Long v. Ford Motor Co.*, 496 F.2d 500 (6 Cir. 1974). Blacks and others were given the rights of a "white person", not a new form of legal status. But the legal status of a claim of right to compulsory association is clear. Before 1866 and still today a white person has had no standing in law to compel others to admit him to an organization, *Moose Lodge v. Irvis, supra, MacDonald v. Shawnee Country Club, Inc.*, 438 F.2d 632 (6 Cir.) *cert. den.* 403 U.S. 932 (1971), *Wesley v. City of Savannah, Ga.*, 294 F.Supp. 698 (S.D. Ga. 1969), *Central Presbyterian Church v. Black Liberation Front*, 303 F.Supp. 894 (E.D. Mo. 1969).

Compulsory admission to a private school was never a right of white citizens and therefore the denial of such a right could not be a 'badge or incident' of slavery. That this was not intended to be a right under § 1981 was particularly affirmed on the explication of the 1866 Act given by its Floor Manager, Congressman Wilson,

> This part of the bill will probably excite more opposition and elicit more discussion than any other; and yet to my mind it seems perfectly defensible. It provides for the equality of citizens of the United States in the enjoyment of "civil rights and immunities". What do these terms mean? Do they mean that in all things civil, social, political, all citizens without distinction of race or color, shall be equal? By no means can they be so construed . . . . Nor do they mean that all citizens shall sit on the juries or that their children shall attend the same schools. These are not civil rights or immunities.
>
> (Cong. Globe 1866, Mar. 1, p. 1117).

Consensuality is at the heart of all contract doctrine. True, in *Jones* the property owner did not want to sell but was a large scale corporate developer. In *Sullivan* the property sale was consented to by the owner and only the extent of the rights passed were in question. In *Tillman* the contract in the swim club had already been made and only the scope of the rights under it were considered. In short, nothing in this Court's decisions has ever conferred preferential rights of compulsory contracting on black citizens. It has merely been held that what they receive in a transaction shall not be less than a white citizen would receive whenever some third private party was

willing to contract with him, *Cook v. The Advertiser Co., Inc.*, 458 F.2d. 1119, 1124 (5 Cir. 1972), *Sims v. Order of United Commercial Travelers of America*, 343 F.Supp. 112 (D. Mass. 1972).

The prerequisite of consent to a private contract was not a disability of slavery but one of law applicable to all citizens and therefore cannot fall within the types of private discrimination to be prohibited under § 1981.

III

THE RULING BELOW IS IN CONFLICT WITH THE PRIOR HOLDINGS OF THIS COURT

The constitutionality of maintaining a white private school has been before this Court by necessary implication in three prior cases involving differing forms of state action, denying them (1) use of free state textbooks in *Norwood v. Harrison, supra*, (2) access to public athletic grounds in *Gilmore v. City of Montgomery, Alabama, supra*, and (3) educational tax exemptions in *Coit v. Green*, 404 U.S. 907 (1971) *aff'g. per curiam Green v. Connally*, 330 F.Supp. 1150 (D.D.C. 1971).

In *Norwood* (p. 469) it was held

> The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education. . . . Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State.

Gilmore held that "private segregated school groups" could not be given exclusive use of city-owned recreational facilities on the same basis as others. This Court said (94 S.Ct. at 2427)

> We close with this word of caution. It should be obvious that the exclusion of any person or group – all-Negro, all-oriental, or all-white – from public facilities infringes upon the freedom of the individual to associate as he chooses. Mr. Justice Douglas emphasized this in his dissent, joined by Mr. Justice Marshall, in *Moose Lodge*. He observed, "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." 407 U.S., at 179-180, 92 S.Ct., at 1975. The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machine of democratic government and insures peaceful, orderly change.

The three-judge opinion which was summarily affirmed by this Court in *Coit v. Green*, stated of these intervenor schools

> The general right of association is protected no matter how unpopular the group's purposes or characteristics may be. Indeed, one has the constitutionally protected right to belong to political groups embracing both legal and illegal

> aims so long as one does not intend to engage in acts in furtherance of their unlawful purposes. *Scales v. United States,* 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961), *Elfbrandt v. Russell,* 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed. 2d 321 (1966). "For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button,* 371 U.S. 415, 444-445, 83 S.Ct. 328, 344, 9 L.Ed.2d 405 (1963).
>
> Neither plaintiffs' prayers nor defendants' policy seeks to stop intervenors from sending their children to segregated private schools at their own expense, paying the full cost of education at such schools.
>
> 330 F.Supp. 1150 at 1166, *aff'd. per curiam* 404 U.S. 997, 92 S.Ct. 564 (1971).

Intervenor says that in each of these three cases the constitutionality of the continued maintenance of segregated private schools was a necessary pre-determination to the actual decision. To the contrary, both the District Court and Circuit majority have ruled that this Court's statements should not be so interpreted and the question is therefore novel (App. 13a, 42a-43a). The District Court repeated your *Norwood* language (App. 42a-43a)

> Intervenor has seized on certain dicta of the Supreme Court in *Norwood v. Harrison,* 41 U.S.L.W. 5094 (June 25, 1973), which states that "private bias" is not proscribed by the

> Constitution and that "private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . ." Comforting as these words may be to the defendants out of context, it must be pointed out that § 1981 was not there involved; that *Jones v. Mayer Co.* was cited to the contrary as an example of private discrimination made unlawful by Congress; and that the opinion specifically points out that "[t]his case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race or religion. . . ." *Norwood v. Harrison*, at 5095.

The fact that § 1981 was not involved in *Norwood* is not the point. It can hardly be said that this Court overlooked that statute particularly since it pointed out that *Jones*, based on the same origins, was an example of unlawful private discrimination.

On the other hand, the Court of Appeals did agree (App. 13a) that § 1981 had been considered by you in *Norwood*

> Finally the Court in *Norwood* recognized the thrust of § 1981 and § 1982 when it noted that private discrimination "has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment." 413 U.S. at 470. We deal with such circumstances. In short, we cannot read *Norwood* as a holding that segregation

in private schools such as these is constitutionally protected so as to be beyond the reach of § 1981.

In the opinion of intervenor the holding below is in direct conflict with your decisions in *Coit*, *Norwood*, and *Gilmore* and certiorari should be allowed to correct the error.

CONCLUSION

The petition should be granted, the judgment of the Court below reversed and the case remanded to the District Court to grant the declaratory judgment prayed in intervenor's counterclaim. In support of this prayer intervenor has here shown that the issue is one of major constitutional proportion, fully presented on this record, that the Courts below have misread the rule established by your opinions in *Jones*, *Sullivan*, and *Tillman*, and the judgment sought to be reversed is in conflict with your decisions in *Coit*, *Norwood*, and *Gilmore*.

Respectfully submitted,

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Counsel for Petitioner

August 22, 1975.

APPENDIX

[Filed April 15, 1975]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2348

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Russell L. Runyon, Katheryne E. Runyon,
Defendants,
Southern Independent School Association,
Appellant.

No. 73-2349

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Russell L. Runyon, Katheryne E. Runyon,
Appellants,
Southern Independent School Association,
Defendant.

No. 73-2350

Michael C. McCrary, infant by
Curtis L. McCrary and Sandra McCrary,
Plaintiffs,

Colin M. Gonzales, infant by Raymond
Gonzales and Margaret R. Gonzales,
Appellants,

v.

Russell L. Runyon, Katheryn E. Runyon,

Southern Independent School Association,
Appellees.

No. 73-2351

Colin M. Gonzales, infant by his parents,
Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Fairfax-Brewster School, Inc.,
Appellant.

No. 73-2352

Colin M. Gonzales, infant by his parents,
Raymond Gonzales and Margaret R. Gonzales,
Appellants,

v.

Fairfax-Brewster School, Inc.,

Appellee.

Argued April 2, 1974. Decided April 15, 1975

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. Before Haynsworth, Chief Judge, and Winter, Craven, Butzner Russell, Field and Widener, Circuit Judges, sitting en banc.

George S. Leonard and Louis Koutoulakos for Appellants in Nos. 73-2348, 73-2349 and 73-2350; Andrew A. Lipscomb (Gary R. Sheehan and Tolbert, Lewis and Fitzgerald on brief) for Appellants/cross-Appellees in Nos. 73-2351 and 73-2352; (Thomas J. Schwab on brief for Amici Curiae in Nos. 73-2348, 73-2349 and 73-2351; Allison W. Brown, Jr., (Robert M. Alexander and Roderick V.O. Boggs on brief) for Appellees/cross-Appellants in Nos. 73-2348, 73-2349, 73-2350, 73-2351 and 73-2352.

HAYNSWORTH, Chief Judge:

The issue in this case is whether 42 U.S.C.A. § 1981[1] prohibits private schools from denying admission to qualified black applicants solely on the basis of their race.

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[1] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons

(continued)

This appeal is a consolidation of two suits initiated by parents of black children who claim that they were denied admission to the appellant schools because of their race.

The Southern Independent School Association intervened in these actions, alleging that it is an association representing over 300 private, non-profit schools in the South, some of which concededly are racially exclusive in their admission policies. The position of the intervenor is simply that racial discrimination by private schools is not prohibited by § 1981, and, in any event, cannot be constitutionally prohibited.

I.

As found by the trial judge, in early May 1969, the parents of Colin Gonzales contacted the Fairfax-Brewster School, a private school located in Fairfax County, Virginia, about enrolling their son in the school's summer day camp program, and continuing into the first grade in the fall. The Gonzales' learned of Fairfax-Brewster through a mass mailing addressed to "Resident," an advertisement in the Yellow Pages in the telephone book, and from a friend whose son attended the Summer Camp.

Thereafter, the Gonzales' visited the school and, being pleased with what they saw, completed an application for their son. They also furnished, as required, a medical certificate and application fee. On May 16, 1969, the medical certificate and application fee were returned, accompanied

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[1] (continued) and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

by a form letter stating that the school was "unable to accommodate the application." No further explanation was given.

Mr. Gonzales called the school and spoke with someone who identified himself as Captain Reiss. In response to Mr. Gonzales' inquiry as to why his son's application was rejected, he was told that the school was not integrated.

Captain Reiss is the Chairman of the Board of Fairfax-Brewster School. His son, Robert, is the Administrative Director, and his daughter-in-law Olga is the Registrar.

Both Captain Reiss and his son deny any such conversation. They testified that Colin, age 5-1/2, was rejected because they felt that the kindergarten he had previously attended gave Colin insufficient preparation for the first grade at Fairfax-Brewster. Because they found Colin unqualified for the first grade, the Reisses concluded that "there was no point" in allowing him to enter the summer camp only to have to "yank him out" at the beginning of the academic year.

Subsequent to their son's rejection from Fairfax-Brewster, the Gonzales' telephoned Bobbe's School, and were told that only members of the Caucasian race were accepted.

In August 1972, Mrs. McCrary called Bobbe's School about enrolling her two-year-old son, Michael, in the nursery school. She asked whether the school was integrated and accepted blacks, and was told it did not. She did not file a formal application with Bobbe's.

Mr. Gates, the superintendent of Bobbe's, testified that he never received a call from either the Gonzales' or Mrs. McCrary. He testified that the school does not discriminate on the basis of race, although he said that no black child had ever applied.

The district court found the testimony of the Reiss "unbelievable," and concluded that Colin had been rejected from Fairfax-Brewster because of his race. He further found that both the Gonzales and Mrs. McCrary had called Bobbe's and had been told that the school would not accept blacks. It held that "[i]t is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told it was useless."

Accordingly, the court concluded that the appellant schools practiced racial discrimination in their admissions policies.

On the authority of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) and *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973), it held that § 1981 prohibits racial discrimination in private contractual arrangements, even when there is no state involvement. Therefore, it held that the schools were in violation of § 1981 in their admissions policies, and permanently enjoined defendants and intervenors from discriminating against blacks in enrollment in their schools. In addition, it awarded damages for embarrassment, humiliation and mental anguish to Colin, Michael and Michael's parents, and attorney's fees against Fairfax-Brewster and Bobbe's. *Gonzales v. Fairfax-Brewster School, Inc.*, 363 F. Supp. 1200 (E.D. Va., 1973).

Defendants and intervenor appeal. We affirm the injunction and the award of damages, but reverse the award of attorney's fees.

II.

Initially, the appellants contest the district court's findings of facts, urging that the district court was clearly erroneous in concluding that Fairfax-Brewster and Bobbe's practice racial discrimination.

There was conflicting testimony as to whether the Gonzales had been told that Fairfax-Brewster was not integrated and whether both the McCrarys and Gonzales' were told that Bobbe's was not integrated. Resolution of this conflict depended upon the district court's evaluation of the credibility of the witnesses. We may not reverse a trier of fact, who had the advantage of hearing the testimony, on a question of credibility.

In addition, the testimony of the black parents was corroborated and supported by the testimony of two other witnesses. Mrs. Bryant testified that she had telephoned Fairfax-Brewster and Bobbe's to inquire about their admissions policies and was told that the schools were not integrated. Mr. Brooks, Mrs. McCrary's supervisor at her job, testified that a Mr. Gates, at Bobbe's, told him, over the telephone, that Bobbe's did not accept blacks.

The trial judge also thought that the Reiss's story that Colin was rejected on educational rather than racial grounds was undercut by the fact that Fairfax-Brewster allows applicants to take an entrance examination when previous scholastic preparation is inadequate. Colin was not given this opportunity.

In short, there is ample evidence in the record to support the trial judge's factual determinations, and we are unable to say that, viewing the record as a whole, he was clearly erroneous in concluding that Colin and Michael were denied admission to the schools because of their race.

III.

The substantive legal questions, which have been the subject of varied comment in the literature,[2] we think were correctly resolved by the district court. Section 1981 is a limitation upon private discrimination, and its enforcement in the context of this case is not a deprivation of any right of free association or of privacy of the defendants, of the intervenor, or of their pupils or patrons.

A.

It may once have been supposed that § 1981 served only the limited office of removing legal disabilities which state statutes imposed upon black people. It, of course, did cancel state statutes which imposed restrictions upon the right of blacks to contract, but the Supreme Court has clearly held that it did much more than that. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229; *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973).

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[2] *See*, Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974); Note, Desegregation of Private Schools: Section 1981 as an Alternative to State Action, 62 Geo. L.J. 1363 (1974); Note, Segregation Academies and State Action, 82 Yale L.J. 1436 (1973); Comment, Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzales v. Fairfax-Brewster School, Inc., 122 U. Pa. L. Rev. 471 (1973); Recent Decisions, 45 Miss. L.J. 246 (1974); Recent Decisions, 8 U. Rich. L. Rev. 285 (1974); Recent Cases, 42 U. Cin. L. Rev. 767 (1973); Recent Cases, 26 Vand. L. Rev. 1307 (1973).

In *Jones v. Mayer*, the Court was concerned with the right to purchase real estate. There a real estate developed had refused to sell a residence in a "white area" to the black plaintiff. Analyzing the text and legislative history of § 1 of the Civil Rights Act of 1866,[3] the Court held that § 1982 applied to purely private activity and provided a judicial remedy. As so construed, it was held that enactment of § 1982 was a valid exercise of the power of Congress under the enforcement clause of the Thirteenth Amendment, which gave Congress power to "pass all laws necessary and proper for abolishing all badges and incidents of slavery."[4] The Court concluded that, unlike the Fourteenth Amendment, the Thirteenth reached private conduct in which no state action was involved.

As an intellectual exercise, the historical reading and interpretation of the majority in *Jones v. Mayer* may be debatable. *See* VI History of the Supreme Court of the United States; Fairman - Reconstruction and Reunion, 1207, *et seq.* That reading and interpretation was followed in *Sullivan v. Little Hunting Park* and in *Tillman v. Wheaton-Haven*, however, and, for us, is firmly established.

Jones v. Mayer, of course, dealt with § 1982, assuring the right to purchase property. We deal with § 1981, assuring the right to contract, but both sections derive from § 1 of the Civil Rights Act of 1866. Both are subject to the same analysis and must be interpreted in the same light. In *Tillman v. Wheaton-Haven*, the claim of the guest and the host rested upon § 1981. The Supreme Court expressly noticed

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[3] 14 Stat. 27.

[4] Civil Rights Cases, 109 U.S. 3, 20 (1883).

the relation between § 1981 and § 1982, their common derivation from § 1 of the Civil Rights Act of 1866 and the necessity of according them similar interpretation.

It is contended here, however, that § 1981 confers no right of action unless the contract denied the aggrieved person was open to all white people. It seems obvious that the relationship between the school on the one hand and a pupil and his parents on the other hand is a contractual one and that admission is a part of the process of forming such a contractual arrangement. It is also true that admission to the school is not open to all white people because there are academic, financial and other restrictions upon admission. Within the qualified class, however, there is no other limitation upon the admission of white applicants up to the school's capacity.

We may not read § 1981 so restrictively as the schools would have us to do it. The school may not refuse with impunity to accept an otherwise qualified black applicant simply because it declines to admit unqualified white applicants. The section is violated by the school as long as the basis of exclusion is racial, for it is then clear that the black applicant is denied a contractual right which would have been granted to him if he had been white.

What we have said should not be read to call into question the right of the school to insist upon an evenhanded requirement of academic and other racially neutral qualifications. Indeed, the right of the school to be selective on those bases is unquestioned here. All that is contended and all that we hold is that § 1981 prohibits the rejection of a black applicant when his qualifications meet all other requirements and race is the only basis for his rejection.

B.

As applied here, we see no violation of any constitutionally protected rights of free association and of privacy.

There is a protected right of free association. As stated by the Supreme Court in *NAACP v. Alabama*, 357 U.S. 449 (1958), "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of ***freedom of speech." *Id.* at 460. The constitutional protection, however, is essentially an attribute of First Amendment rights and would not ordinarily justify exclusion of others sharing the same beliefs and ideas. Here, at least, there is no showing that discontinuance of their discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.

Nothing in § 1981 impedes parents in their exercise of a choice of a private school presenting ideas or having educational methods or practices which are not available in the public schools. They may do the same thing to avoid ideas and influences in the public schools which they regard as unhealthy. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Among private schools, they are free to prefer one with a certain curriculum or dogma over others, but the school, while it may exclude applicants on the basis of neutral principles, may not exclude on the basis of race.

There is also a right of privacy. Its constitutional basis may be elusive, but it has clearly been held to exist. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Though certain intimate and private affairs of men and women are protected from governmental interference, the schoolhouse is far from the realm of protection. The right

is appropriately recognized in certain instances when only a few people are involved in activity unintended for the public view. In such instances, it is more than likely or inevitable that there is some plan or purpose of exclusiveness other than race. When relations between husband and wife are involved, their purpose to exclude all the rest of the world has no racial connotations. When a school holds itself open to the public, however, or even to those applicants meeting established qualifications, there is no perceived privacy of the sort that has been given constitutional protection.

Indeed, § 1981 does not purport to reach all private associations. It reaches only those which evidence "no plan or purpose of exclusiveness" other than race. *Sullivan v. Little Hunting Park, supra.* Private associations having non-racial criteria for the selection of members may apply their criteria, even if it results in a disproportionate impact upon the members of one race. It is only when blacks are excluded because they are black, or denied a right to contract which would be granted were they white, that § 1981 is violated.

Nor do we read anything in *Norwood v. Harrison,* 413 U.S. 455 (1973), as holding that rights of association or rights of privacy, or both combined, prevent the application of § 1981 here. In *Norwood* the Supreme Court struck down a Mississippi statute giving free textbooks to all students, including those attending private, segregated schools. Mississippi contended that its failure to furnish free textbooks to students in private, segregated schools would violate the equal protection clause and would undermine the right of the parents to send their children to private schools. In answer, the Court observed that because "the Constitution may compel tolerance of private discrimination in some circumstances does not mean that it requires state support for such discrimination." 413 U.S. at 463.

The observation in *Norwood* is far from a holding that segregation in a private school is constitutionally protected. Earlier in the opinion the Court had observed that no such question was presented. 413 U.S. at 457. Nor are we met with the question whether segregation in private schools is itself a violation of the Thirteenth or Fourteenth Amendment. We deal with a specific statute passed in implementation of the Thirteenth Amendment. *See Katzenbach v. Morgan*, 384 U.S. 641 (1966); Note, Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments, 74 Colum. L. Rev. 449 (1974).

Finally, the Court in *Norwood* recognized the thrust of § 1981 and § 1982 when it noted that private discrimination "has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment." 413 U.S. at 470. We deal with such circumstances. In short, we cannot read *Norwood* as a holding that segregation in private schools such as these is constitutionally protected so as to be beyond the reach of § 1981.

C.

Some schools may be so private as to have a discernible rule of exclusivity which is inoffensive to § 1981. Should siblings combine to employ tutors for their children, they may exclude the rest of the world, for the rule of exclusivity bars the more distantly related and the unrelated regardless of race. The schools here are not private in that sense, and there is no discernible neutral rule of exclusivity which would bar these plaintiffs. The schools are private only in the sense that they are managed by private persons and they are not

direct recipients of public funds. Their actual and potential consistency, however, is more public than private. They appeal to the parents of all children in the area who can meet their academic and other admission requirements. This is clearly demonstrated in this case by the public advertisements. Within that constituency, they may not exclude a black applicant, solely because of his race, while accepting white applicants with comparable qualifications.

IV

The district court awarded damages for embarrassment, humiliation and mental anguish suffered plus an award of attorney's fees. The schools complain of both.

A.

It is not helpful to look to state decisions in personal injury tort cases in which damages for such injuries are denied.[5] That damages are recoverable for violations of § § 1981 and 1982 is established by *Sullivan v. Little Hunting Park, supra,* 396 U.S. 229, 240, in which we are told, "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes."

Section 1981 doubtless was intended to give to the former slaves access to opportunities for material betterment of themselves, but it was also intended to remove the stigma

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[5] After the recent decision of the Virginia Supreme Court in *Womack v. Eldridge,* 43 U.S.L.W. 2267 (Va. December 2, 1974), it is arguable that the plaintiffs here could recover damages in a state tort action for emotional distress. For an earlier discussion of Virginia's requirement of a resulting physical injury in distress cases, see *Hughes v. Moore,* 214 Va. 27, 197 S.E.2d 214 (1973).

which accompanied the disabilities under which they formerly had labored. The plain command of the statutes is that those formerly enslaved henceforth shall be treated as having all of the rights and dignity of other people dwelling with them in a land of freedom. A denial of those statutory rights is treatment of the victim as being subject to those earlier disabilities. It is an affront, of which embarrassment and humiliation are natural consequences. If the statute is to be enforced fairly, if injuries suffered directly because of its violation are to be fairly compensated, damages for embarrassment and humiliation must be recoverable in a case such as this.

B.

The award of attorney's fees stands in a different posture. It is one thing to award damages for the invasion of a legal right and quite another to impose all of the litigation costs on the defendant. Unlike damages, attorney's fees have been granted only in narrowly defined circumstances.

We have recognized the propriety of an award of fees when a party maintained his position in bad faith, displaying "obstinate obduracy." *Brewer v. School Board of City of Norfolk*, 4 Cir., 456 F.2d 943, 948-52. The district court, however, made no finding of "obstinate obduracy,"[6] and we can see no basis for such a finding. Since this suit involves a novel application of a recently revived statute, the litigation of the issues cannot be equated with the recalcitrance we found in *Brewer*. Although at trial the parties

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[6] In refusing punitive damages, the district court found that the defendants had not "acted recklessly or wilfully in disregard of clear existing law." 363 F. Supp. at 1205 n. 5.

recounted different versions of the facts and the court accepted the plaintiffs' story, the finding suggests no bad faith or perjury. Faults in perception or memory often account for differing trial testimony, but that has not yet been thought a sufficient ground to shift the expense of litigation.

Attorney's fees, of course, are available where Congress has expressly authorized them. A conspicuous example is Title II of the 1964 Civil Rights Act.[7] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). Section 1981 never contained a provision for fees, and although the Emergency School Aid Act of 1972 expressly allows fees in suits to desegregate public or federally aided secondary or elementary schools,[8] plaintiffs have made no showing of federal aid to, or state action by, the defendants.

In the absence of expressed congressional direction, we are presented with the question whether to adopt a "private attorney general" theory. Although application of that theory may be proper in some actions based on the 1866 and 1870 Civil Rights Act, it would be inappropriate in this case. In considering an award of fees in an action based on the older civil rights statutes, we look to more recent congressional determinations that a policy is so important or public enforcement mechanisms are so ineffective that attorney's fees are necessary to promote private enforcement. Mere provision of a private cause of action is not sufficient.

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[7] 42 U.S.C. § 2000a-3(b).

[8] 20 U.S.C. § 1617 (allowing fees against a "local educational agency, a State . . . or the United States" for a violation of that Act, Title VI, of the 1964 Civil Rights Act or the Fourteenth Amendment). *See* Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974); Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427 (1973).

A statutory grant of attorney's fees in suits covering the same subject matter, however, would be a strong indication of such a congressional determination.

In *Lee v. Southern Home Sites Corp.*, 5 Cir., 444 F.2d 143, Judge Wisdom looked to the enactment of the Fair Housing Law of 1968, which contained a fees section, 42 U.S.C. § 3612(c), in deciding that fees were available to a plaintiff seeking to redress racial discrimination in the sale of houses under § 1982. In 1968 Congress had acted, pursuant to its powers under the Thirteenth Amendment,[9] to prohibit discrimination in the sale of private housing.[10] In Lee's § 1982 action, he proceeded against precisely the discrimination that Congress had sought to curb by providing for an award of reasonable fees for his attorney to a prevailing plaintiff in a private enforcement action.

Employment discrimination suits provide another example of judicial allowance of fees under the older, more general civil rights stautes. We have recognized that a plaintiff under Title VII might recover attorney fees.[11] Reaching beyond Title VII, courts have allowed fees in actions brought under the older civil rights statutes to eliminate similar employment. discrimination. *Fowler v. Schwarzwalder*, 8 Cir., 498 F.2d 143, (§§ 1981, 1983); *Harper v. Mayor and City Council of Baltimore*, D. Md., 359 F. Supp. 1187, 1218-19, *modified*

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[9] United States v. Hunter, 4 Cir., 459 F.2d 205, 214.

[10] After December 31, 1968, the Act applied to all dwellings, 42 U.S.C. § 3603(a)(2), except those enumerated in § 3603(b). In *Lee* it was not clear whether the Act applied since the transactions occurred before December 31, 1968, and evidence on the applicability of § 3603(a)(1), which covered that time period, was not recounted in the opinion.

[11] 42 U.S.C. § 2000e-5(k); Lea v. Cone Mills Corp., 4 Cir., 438 F. 2d 86; Robinson v. Lorillard Corp., 4 Cir., 444 F.2d 791.

on other grounds sub nom., Harper v. Kloster, 4 Cir., 486 F.2d 1134 (§§ 1981, 1983); *Cooper v. Allen,* 5 Cir., 467 F.2d 836 (§ 1981). In *Cooper* the plaintiff based his suit on racial discrimination in hiring by a municipal golf course, but he failed to go through the conciliation procedures of Title VII and could not proceed under the statute. Nevertheless, Congress had authorized fees in the similar Title VII action to encourage private elimination of such discrimination. Where plaintiffs advance precisely the same congressional goal by the use of a more general statute, they may be entitled to attorney's fees. That is not to say, however, that once fees are awarded in any § 1981 or § 1982 case, they should always be granted in actions based on those statutes. The focus of the inquiry should be whether the plaintiffs advanced a goal the attainment of which Congress sought to further by providing for the recovery by a prevailing plaintiff of his attorney's fees.

In this case the plaintiffs have not acted to foster a goal that Congress deemed so urgent. The Emergency School Aid Act spoke only to desegregation actions against public and federally aided schools. Unlike the Federal Housing Law or Titles II and VII of the 1964 Civil Rights Act, the statute does not aim to eliminate discrimination from a facet of private American life. The limitation in that statute to public schools is not merely a technical or procedural restriction, but goes rather to the substance of the congressional goal. Without some congressional direction, even by analogy, we will not award attorney's fees, but will adhere to the usual rule that prevailing plaintiffs may not recover their attorney's fees,[12] for we find none of the recognized

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[12] Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

exceptions applicable.[13]

AFFIRMED IN PART.
REVERSED IN PART.

BUTZNER, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I, II, III, and IV-A of the opinion. I dissent from Part IV-B, which reverses the district court's allowance of attorney's fees. I would adhere to our practice of sustaining a district judge who, for sound reasons, had allowed attorney's fees. His discretion can be justified in this case on two grounds: the appellees acted as private attorneys general, and, alternatively, the appellants' defense was tainted by obdurate obstinacy.

By prosecuting this single case, the appellees invalidated the racially exclusive admission practices of over three hundred schools represented by the Southern Independent School Association, as well as the practices of Fairfax-Brewster and Bobbe Schools. In so doing, they vindicated congressional policy by abolishing an aspect of racial discrimination prohibited by the Civil Rights Act of 1866 [42 U.S.C. § 1981]. This type of suit is encompassed by the private attorney general doctrine, which is applicable to suits brought under the Civil Rights Acts of 1866, 1871, and 1964. *See, e.g.*, Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., 3-judge court), *aff'd mem.*, 409 U.S. 942 (1972). Under this doctrine, the award

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[13] See Hall v. Cole, 412 U.S. 1 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

is not dependent on proof of bad faith, for good or bad faith is irrelevant. Brandenburger v. Thompson, 494 F.2d 885, 888 (9th Cir. 1974). Nor does the receipt of compensatory damages preclude an award of attorneys' fees, Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972), though, of course, a court may take damages into account when awarding a fee. *See* Lee v. Southern Home Sites Corp., 444 F.2d at 147.

Alternatively, attorneys' fees are justified when dependants display obdurate obstinacy. *See* Brewer v. School Board of City of Norfolk, 456 F.2d 943 (4th Cir. 1972) (dictum). The district court's findings, amply supported by the record, demonstrate that the officers of the schools did not truthfully recount under oath the facts of the case. Such bad faith in the conduct of litigation is a pernicious form of obstinacy that can no more be tolerated than out-of-court bad faith. *Cf.* Hall v. Cole, 412 U.S. 1, 15 (1973). This behavior should not be excused simply because this case involves a novel factual situation. *Cf.* Lea v. Cone Mills Corp., 438 F.2d 86, 88 (4th Cir. 1971); Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 536 (5th Cir. 1970).

Finally, I believe that the enactment of 20 U.S.C. § 1617 directing the allowance of fees in public school desegregation cases does not create an inference that Congress intended to withdraw from district courts "the inherent equitable power"[14] of a chancellor to allow fees in actions against private schools when the facts otherwise justify the award because the plaintiffs acted as private attorneys general or the defendants displayed obdurate obstinacy. Other courts confronted with analogous problems have ot restricted the

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[14] *See* Hall v. Cole, 412 U.S. 1, 5 (1973).

allowance of fees in suits brought under the earlier Civil Rights Acts to instances where Congress has subsequently authorized fees in related legislation. *See, e.g.*, Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974) (welfare benefits); Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., three-judge court), *aff'd mem.*, 409 U.S. 942 (1972) (reapportionment). Indeed, the drastic limitation on the allowance of fees in civil rights cases suggested by the majority appears to be without precedent.

Judge Winter and Judge Craven concur in Parts I, II, III, and IV-A of the court's opinion. They join Judge Butzner in dissenting from Part IV-B.

RUSSELL, FIELD, and WIDENER, Circuit Judges, concurring and dissenting:

I

We concur in the result reached in part IV-B of the opinion of the court. We would not, of course, reach the question of attorneys' fees if our view on the merits prevailed. Otherwise, we respectfully dissent.

II

In its opening paragraph, the majority opinion correctly states the legal issue[1] in this case. We add, however, that the issue is presented to this court as one of first instance

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[1] We are not convinced that the district court's findings of fact are not clearly erroneous. Such laments, however, being largely unavailing, see *United States v. Johnston*, 268 U.S. 220, 227 (1925), we address ourselves to the important legal issue here presented.

in any federal court at this or higher level.[2] We are bound by no definitive Supreme Court decision.

The majority regard *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), followed in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); and *Tillman v. Wheaton-Haven Recreational Association*, 410 U.S. 431 (1973), as being controlling precedents. We do not so regard those decisions.

We believe that the majority has been unduly impressed by the historical relationship between §§ 1981 and 1982, and has failed to discern the difference between the right to purchase real estate and the right to attend an independent school inferred from the right to "make and enforce contracts." The purchase of real estate, with its attending prequisites, is a commercial transaction pure and simple, and many other contracts are likewise purely commercial. On the other hand, the relationship of teacher and student is one of status, which is related to the contract concept in the same way that the status of husband and wife may be said to grow out of a contract of marriage. The contract aspect of the situation is minor and incidental and serves no purpose other than as a door opener in the present case to bring independent schools within the scope of § 1981. The right to make and enforce contracts does not imply a right to coerce an unwilling co-contractor into making any and every variety of contract.

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[2] In *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D. N.C., 1971), the United States District Court for the Western District of North Caroline held the refusal of a barber school to admit black students constituted a violation of § 1981. On the other hand, in *Riley v. Adirondack Southern School for Girls*, 368 F. Supp. 392 (C. D., Fla. 1974), the court refused to apply § 1981 to a racially segregated independent school. The decision is based at least in part on factual determinations. See also, *Segregation in Private Schools*, 122 U. of Penna. L. Rev. 471, at 475 (1973).

The majority opinion also fails to recognize *Moose Lodge v. Irvis*, 407 U.S. 163 (1972); and *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974). True, those cases do not involve § 1981 or § 1982, but involve the problem of State action under the Fourteenth Amendment. However, they do show that answers to apparently the same type of technical questions in this field may vary according to the facts of each particular situation.

Legal problems arising out of a purpose to readjust interracial relationships fall into four categories: (1) those arising under the Fourteenth Amendment; (2) those created by the Civil Rights Acts of the 1960's; (3) those resulting from conditions imposed by the Federal Government upon benefits bestowed such as aids to education; and (4) those arising from the resurrection of the post-Civil War Civil Rights Act of 1866 and the several acts of the 1870's, now found in 42 USCA §§ 1981, *et seq.* Legal problems involving the issues regarding the newly enfranchised slaves were acute until the *Civil Rights Cases*, 109 U.S. 3 (1883). Thereafter, such legal problems became stereotyped until the landmark decision in 1954 of *Brown v. Board of Education*, 347 U.S. 294 (1954). That case introduced the first of the above four categories, which is still paramount. Racially discriminatory action may be struck down under the Fourteenth Amendment provided State action is involved. In the 1960's, the Congress forbade racially discriminatory practices under the Civil Rights Acts of 1964 and 1968. Those acts did not touch private action in some fields. To cover this hiatus, the post-Civil War Civil Rights Acts were resurrected. The leading case is *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which was decided after the passage of the Civil Rights Act of 1964.

After the Thirteenth Amendment abolished slavery in 1865, various States passed Black Codes designed to keep those who were newly enfranchised as second-class citizens if citizens at all. Although such former slaves were now free, the objective was to keep them from exercising the legal rights usually associated with free citizenship such as the ownership of property and the making of contracts. See *Private Discrimination*, 74 Col. L. Rev. 450, 452 (1974). To counteract this movement, the Fourteenth and Fifteenth Amendments were eventually adopted. More immediately, however, the Civil Rights Act of 1866 was passed. It was based upon § 2, the enforcement section, of the Thirteenth Amendment which, unlike the Fourteenth Amendment, did not require State action. What is now 42 USCA §§ 1981 and 1982, were section one of the Act of 1866. And there were misgivings as to the constitutionality of the Act. Simply, they were that the Thirteenth Amendment abolished slavery, and conduct, such as that prohibited by the 1866 Civil Rights Act, did not constitute the reestablishment of slavery in the strictest sense of the word. Because of the constitutional doubt just mentioned, the provisions of the Civil Rights Act of 1866 were reenacted, practically intact, in various statutes passed during the 1870's, after the effective date of the Fourteenth Amendment. Section One of the Act of 1866 was reenacted in 1870 and is now represented by 42 USCA §§ 1981 and 1982. Only the 1866, and not the 1870, Act is here pertinent because State action is clearly not involved in our case. The Acts of 1866 and 1870 were dormant for so many years that in civil law countries a desuetude would have occurred.[3] Not until after the passage of the Civil Rights Act of 1964 was the 1866 Act reactivated. The 1964 Act

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[3] Our dissent is not bottomed on this premise. See *Jones*, p. 437.

made no attempt to prevent racial discrmination in the admission policies of independent schools. If the Thirteenth Amendment authorized Congress to forbid independent schools to use race as an admissions criterion in 1866, it likewise did so in 1964. Whatever the intent of the 1866 Congress may have been, it must be that the 1964 Congress did not intend to restrict the admissions policies of independent schools.

The application of 42 USCA § 1981 to this case may be approached either as a matter of interpretation or as a matter of constitutionality: *i.e.*, (1) what does § 1981 forbid? (2) is § 1981 constitutionally valid? Here, those two questions merge together. Section 1981, as any other statute, should be construed, in the light of constitutional limitations, to uphold its validity. See *Graham v. Richardson*, 403 U.S. 365, 382 (1971).[4]

While dissenting, we wish to make it clear that we do not necessarily express approval of the alleged restrictive admissions policies of the appellants. What is involved here is a collision between competing social interests, any of which, standing alone, would be regarded with favor.

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[4] Our result would be the same whether we construe § 1981 as being in conflict with the constitutional right of free association, or construe it consistent therewith. Of course a statute falls if in conflict with the Constitution. *The Federalist*, Nos. 16, 78, Hamilton; No. 44, Madison. In this connection, footnote 3 of the district court's opinion is curious (363 F. Supp. 1200 at 1204). That note states that although § 1981 forbids discrimination by whites against non-whites, it does not forbid discrimination by non-whites against whites or other non-whites. Such a construction would make the section clearly unconstitutional. Simply put, the opinion of the district court is that all races, so far as § 1981 is concerned, may operate racially segregated schools except the white race. Either all may do so (as we

(continued)

On the one hand, our society has an interest in the upward mobility of all of its citizens, unhampered by invidious distinctions. A corollary of this is an interest in educational opportunities.

This interest in educational opportunity as a means of upward mobility is confronted by social interests in the true independence of private educational institutions, and in the right of voluntary association and non-association. Although the backbone of our educational system must of necessity be found in our public schools, in a diverse society such as ours the leavening value of educational instutions which are autonomous and free from control by the federal and state governments is generally and legally accepted. Compare *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). Society has an interest in preserving the true independence of such institutions.

The other social inteest which supports the position of appellants is the interest in free association. It is conceded that, as a general matter, enforced association is foreign to our institutions. Mr. Justice Douglas, in his dissenting[5] opinion in *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972), stated, at p. 179, the proposition thus:

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4 (continued)

contend), or none may. Such a restrictive construction of § 1981 also goes against the plain language of the statute. The section provides: "*All* persons . . . shall have the *same* right . . . to make and enforce contracts . . . as is enjoyed by white citizens, and shall be *subject to like* [disabilities of various kinds] . . ." (emphasis added). To give non-whites greater rights than whites would run contra to the statute, the same as giving them less rights would violate it.

[5] The force of Mr. Justice Douglas' statement is not reduced by the fact that it was part of a dissenting opinion; in fact, it is accentuated. The issue in the case was whether the fact that a private club dispensed liquor by virtue of a State license made its action State action. The majority thought not; Mr. Justice Douglas thought so. Thus, the quoted language was opposed to the main thrust of the opinion.

> "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be selective as he desires."

Even were we to assume, for argument, the majority holding that the persuasiveness of the right of free association depends, in part at least, upon the size of the unit, both of the schools here involved are small. They are not huge and impersonal. The district court's opinion, 363 F. Supp. 1200, 1201, 1202, indicates a maximum enrollment at Fairfax-Brewster School at 236 and at Bobbe's School an average of 200. In schools of that size, intimacy of personal association is still important, and the right of free association certainly should apply, if it does in any case, to units of such numbers. How great a size, if any, might destroy the constitutional protection is a question not now before us.[6]

It is one of the missions of law to balance conflicting social interests so as to give the maximum of protection to each.[7] Which interest will prevail will depend therefore upon special considerations in each context in which the conflict is presented. A good illustration of this point is to

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[6] The numbers involved in *NAACP v. Alabama* and *Gilmore* would seem to indicate that great numbers alone do not necessarily furnish sufficient cause to lose the constitutional protection of freedom of association.

[7] See Julius Stone, *Social Dimensions of Law and Justice* (Stanford University Press, 1966), Chapter 4, pages 164, *et seq.*, citing Roecoe Pound and other legal scholars. Somewhat this same idea is suggested in 122 U. Penna. L. Rev. 471 at 478, 479 (1973), and 74 Col. L. Rev. 449, 468, 469 (1974).

be found in a comment upon the district court's decision in the instant cases in *Segregation in Private Schools*, 122 U. Penna. L. Rev. 471, at 478, 479 (1973). It is there stated that "a balancing of Constitutional interests is necessary to produce a proper construction of Section 1981." The author continues:

> "Our discussion to this point suggests where the balance might be struck without seriously impairing either right. The right to contract protected in Section 1981 should be limited to contracts found in secondary, as contrasted with primary relationships. The former [sic, latter] are 'basically relationships between friends,' characterized by 'intimate association.' Secondary relationships, by contrast are 'impersonal, highly formalized relations between people,' for example, the relationship between buyer and seller . . . under this approach, discrimination would be allowed in primary relationships for any reason whatever, including racial bias, . . ."

The article suggests that such a differentiation reconciles the results in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). If this approach is used, it seems to us that a secondary school as found here involves a primary relationship and thus is not within the scope of § 1981.

So far as the balancing of conflicting interests is concerned, the difference between the right to own property, under § 1982, and the alleged right to attend an independent school under § 1981 becomes apparent. The word "right" is ambiguous. See *Private Discrimination*, 74 Col. R. Rev. 449, at 469 (1974). It may mean an immunity from legal disability to own property or make a contract. In Hohfeldian

terms, this would be a privilege. Or it may mean a power to compel another to convey property or enter into contractual relations notwithstanding a refusal to do so solely because of race. It is not necessary to assume that the word right means the same in all contexts. If on the one hand we consider society's interest in upward mobility and the removal of invidious discrimination against disadvantaged groups, it would seem clear, as pointed out in the Columbia Law Review citation, *supra*, that a mere freedom from legal disability to own property would be of little value to a black person if prospective vendors could refuse to sell to him because of his race. There might be no other source from which he could purchase property. Thus, the Supreme Court's decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), can be readily understood and accepted, even were we not under obligation to accept and follow it.

The same basis of necessity is not available to support the desire of blacks to attend an all white independent school. The overwhelming portion of the burden of educating our people is borne by public schools, which by law are non-segregated. If all schools, nursery through college, are considered, in 1972, 86.6% attended public schools and only 13.4% attended non-public schools. If only secondary schools, which is what are involved in this case, be considered, statistics show that in 1972, 92.4% of students attended public schools and only 7.6% attended non-public schools. (American Almanac for 1974, page 108). These statistics are the more significant when it is considered that more independent schools, including all or practically all church affiliated institutions, do not use race as a basis for admission. Thus, so far as acceptance as a first-class citizen is dependent upon educational opportunity, the impact of schools such as those operated by the two appellants is diminutive. If it be asserted that the exclusionary policies of schools such as these ap-

pellants have invidious implications, it must be remembered that most, if not all, of the high prestige private schools, are not racially segregated. In fact, many of them make an affirmative effort to obtain black students. See *Segregated Academies and State Action*, 82 Yale L. Jour. 1436, at 1444 (1973). Indeed, at the time of the district court's decision in this case, appellee Colin Gonzales had been accepted by and was attending the Congressional School, a non-public school. 363 F. Supp. 1202. Insofar as society's interests in educational opportunity for all of its citizens and the removal of invidious discrimination are weighed against society's interests in true independence of non-public educational institutions and freedom of association, especially in connection with close, intimate relationships, we believe that, unlike the right to purchase property involved in *Jones v. Alfred H. Mayer Co.*, the balance is in favor of construing the right to make and enforce contracts protected by § 1981 as being a freedom from legal disability and not as being extended to prohibiting a non-public institution from operating on a racially segregated basis.

As we have previously indicated, we do not find it necesary to express an opinion on the constitutional validity of 42 USC § 1981, but we do feel compelled to say that the result reached by the majority is an unconstitutional and invalid application of the statute. Our conclusion is supported by the opinion of the court in *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), which adopts, in the opinion of the court, the language we have previously quoted from the dissenting opinion of Mr. Justice Douglas in *Moose Lodge* to the effect that people may band together in their association with whomsoever they please. And those cases specifically refer to the forbidden and highly suspect classifications of race and religion. Nothing in history or the precedents contains any suggestion that the same reasoning applied to a

religious school in *Pearce*, to a social club in *Moose Lodge*, and indeed (albeit in slightly different context) to private schools in *Gilmore*, should not apply here. And we think the majority takes too little account of *Norwood v. Harrison*, for in that case, in a discussion of the precise type of segregated private school involved here, the court unequivocally stated that the very bias here charged is neither invalid nor subject to sanction of law:

> "Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State." 413 U.S. 455, 469.

We would reverse the judgment of the district court on all points.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-2351

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales,

Appellees,

vs.

Fairfax-Brewster School, Inc.,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part.

/s/ WILLIAM K. SLATE, II
William K. Slate, II
Clerk

Filed April 15, 1975

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 73-2348
73-2349
73-2350

[Filed May 29, 1975, by William K. Slate, II, Clerk]

Michael C. McCrary, infant by Curtis L. McCrary and Sandra McCrary and Colin M. Gonzales, infant by Raymond Gonzales and Margaret R. Gonzales,	:
Appellees,	:
v.	:

Russell L. Runyon, Katheryne E. Runyon,
Defendants,

Southern Independent School Association,
Appellant.

Nos. 73-2351
73-2352

Colin M. Gonzales, infant by his parents, Raymond Gonzales and Margaret R. Gonzales,
Appellees,

v.

Fairfax-Brewster School, Inc.,
Appellant.

ORDER

Upon consideration of the petitions for rehearing filed on behalf of the appellants and the appellees,

IT IS ORDERED that Section IV-A of the opinion be amended, adding at the end thereof a paragraph reading:

> While allowing damages in favor of the McCrarys against Bobbe's School and in favor of Colin Gonzales because of his minority, the district court denied an award of damages to Mr. and Mrs. Gonzales since it concluded that their claim was foreclosed by the applicable statute of limitations. The statute applied was the

> first sentence of Virginia Code § 8-24, applicable to actions for personal injuries. It is contended on appeal that the judge should have applied Virginia's five-year statute, the second sentence of § 8-24, applicable to actions not otherwise provided for in more specific statutes of limitations. While the action is brought under Section 1981, the damage claim is entirely referable to injured feelings and humiliation. We have held such claims asserted under the Reconstruction Acts to be governed by Virginia's two year statute. *Allen v. Gifford*, 4th Cir. 462 F.2d 615; see *Almond v. Kent*, 4th Cir., 459 F.2d 200. It is also contended that the five year statute for actions on a contract, Virginia Code § 8-13, applies, but it is clear that no action on a contract is involved.

IT IS FURTHER ORDERED that the petitions for rehearing be and each of them hereby is denied.

Upon consideration of the motion for allowance of attorneys' fees on appeal filed on behalf of the appellees,

IT IS ORDERED that the motion for allowance of attorney's fees be and hereby is denied.

In conformity with Alyeska Pipeline Service Company v. Wilderness Society, 43 U.S.L.W. 4561 (U.S. May 12, 1975), Judge Butzner withdraws that part of his dissent approving the district court's allowance of attorneys' fees on the basis of the private attorneys general theory. However, he retains the section which would affirm the allowance of fees because of the defendants' bad faith. *See* Alyeska Pipeline Service Company v. Wilderness Society, *supra*, 43 U.S.L.W. at 4567, 4570 n. 46. Judge Winter and Judge Craven concur in this amendment of Judge Butzner's dissent.

Except as modified herein, each member of the court adheres to the position he took in the previously released opinions.

FOR THE COURT

/s/ Clement F. Haynesworth, Jr.
Clement F. Haynesworth, Jr.
Chief Judge, Fourth Circuit

May 26, 1975

[Filed July 27, 1973]

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COLIN M. GONZALES, *et al.*,	:	
Plaintiffs,	:	**Civil Action No.**
v.	:	**494-72-A**
FAIRFAX-BREWSTER SCHOOL, INC.	:	
Defendant,	:	
and	:	
MICHAEL C. McCRARY, *et al.*,	:	
Plaintiffs,	:	
v.	:	**Civil Action No.**
RUSSELL L. RUNYON, *et al.*,	:	**495-72-A**
Defendants,	:	

and :

SOUTHERN INDEPENDENT SCHOOL :
ASSOCIATION, :

Intervenor- :
Defendant. :

MEMORANDUM OPINION AND ORDER

On May 17, 1954, the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954). The same year Fairfax-Brewster School was founded. It commenced operations in 1955. In 1958, Bobbe's Private School commenced operations. Neither school receives any assistance, financial or otherwise, from any state, local or federal agency; and each relies entirely on funds derived from tuition paid by students to support its operations. In 1956, Fairfax-Brewster commenced operation of a summer day camp and in 1967, Bobbe's did the same thing.

The enrollment at Fairfax-Brewster School grew from an average of 21 in the first year, 1955-56, to 223 in the year 1972-73. The rise in enrollment has generally been increasing except for the year 1969-70, when it dropped to 177 from the previous year's 208. The day camp's enrollment records are not available prior to 1962, but it shows a growth from 21 that year to 236 in the summer of 1972. An unusually large increase was shown in 1969 over the previous year, but this dropped back in 1970.

Bobbe's School grew from 5 in 1958 to an average of 200 in the years 1966-72. The day camp has averaged 100 students per year since its commencement. Neither school has ever had a black enrolled at either its day camp or school. Both schools require submission of an application form, a

medical certificate as to the child's health, and a personal interview with the parties.

In early May of 1969, in response to an advertisement appearing in the "yellow pages" of the telephone directory similar to Pltf's Ex. 3, the parents of Colin M. Gonzales, both of whom are black, as is Colin, telephoned and then visited the school where they were shown around. Being pleased with what they saw, they completed, on forms then furnished them by the school, an application for the day camp and later a medical certificate prepared by a doctor. They subsequently submitted these to the school with a check for either $15 or $20. On May 16, 1969, Mr. and Mrs. Gonzales received the medical certificate and check in the mail with a form letter from Fairfax-Brewster (Pltf's Ex. 2) stating that the school was "unable to accommodate the application." No reason was given. Upon receipt of the letter Mr. Gonzales called the school, spoke to a person who identified himself as Captain Reiss,[1] and, in response to his inquiry as to why his son's application was rejected, was told "we are not integrated." Both Robert S. Reiss and Stuart Reiss denied any such conversation. They then stated that Colin, whom they believed was primarily interested in entering the first grade, was rejected, not on the basis of his race, but because his application lacked supporting data as to his previous schooling. Moreover, knowing that Colin had previously attended Crossroads Day Nursery, they claimed he would not qualify for the first grade. Consequently, since eligibility for the day camp was contingent on one's being qualified for the first grade, they felt it would be unfair to allow Colin to enter the day camp and then have to

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[1] Capt. Stuart A. Reiss is the Chairman of the Board while his son, Robert S. Reiss, is the Administrative Director, and his daughter-in-law, Olga M. Reiss, the registrar.

be withdrawn before the commencement of the academic year. In conclusion, the three Reisses all denied that it was the school or day camp's policy to exclude an applicant because of his race. The Court rejects this testimony as unbelievable and finds that the reason for the rejection was because Colin was black.

Subsequent to his son's rejection by Fairfax-Brewster, Mr. Gonzales telephoned Bobbe's School where, in answer to an inquiry as to whether it was integrated, he was told that only members of the Caucasian race were accepted. He filed no formal application with Bobbe's School.

Application was ultimately made for Colin at Congressional School, a non-public school, where he was accepted and did well.

In August 1972, in response to an advertisement in the "yellow pages" of the telephone directory, Mrs. Sandra McCrary, who is black, called Bobbe's Private School to enroll her 2-year-old son, Michael, in nursery school. After first inquiring as to the price, policies, meals, transportation and facilities for "toilet training," she asked if the school was integrated. Upon receiving a negative reply, she asked if the school accepted black children. The answer to this question was also "no." She filed no formal application with Bobbe's.

Bobbe's denied receiving telephone calls from either Mr. Gonzales or Mrs. McCrary; stated that it was not the policy of the school to exclude anyone because of race; denied that the school has ever told anyone that the school was not integrated; and stated that no one can be considered without a personal interview with the applicant and his parents or without a formal application being submitted with an accompanying medical certificate. Bobbe's introduced further testimony that no black child had ever applied for enrollment.

The Court finds that the calls were made to Bobbe's and that both Colin Gonzales and Michael McCrary were denied admission because they were black. It is of no moment that no formal application was filed. It would be ridiculous to require this of the plaintiffs after they had effectively been told it was useless.

The policy of the schools with regard to exclusion of blacks was corroborated by Mrs. Bryant and Mr. Brooks. The former testified that in 1972 she telephoned Fairfax-Brewster and Bobbe's School to inquire about their admission policies. She testified that both schools told her they were not integrated and would not accept blacks. Mr. Brooks, a deputy Equal Employment Opportunity Commission officer with the Navy and Mrs. McCrary's supervisor, testified that after he became aware of the McCrary's allegations as raised in this suit against Bobbe's he decided to call for himself. He stated that during his telephone conversation of May 31, 1973, with a Mr. Gates at Bobbe's, he asked whether the school was accredited and if it was integrated. Upon receiving a negative response to the latter question Brooks further asked if blacks were admitted. Again he was told "no."

Colin Gonzales has filed an action against Fairfax-Brewster. Mr. and Mrs. McCrary, Michael McCrary, and Colin Gonzales have filed an action against Bobbe's. The sole basis for the actions is 42 U.S.C. § 1981.[2] The Southern Independent School Association intervened as a party-defendant in the

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[2] Originally 42 U.S.C. § 2000a was alleged as a basis for the actions. This was withdrawn prior to trial.

action against Bobbe's, asserting that it represents "non-profit, private white schools in seven states and the class of all similarly situated schools and their associated students and parents."

The intervenor takes a different tack from that of the principal defendants. It concedes that race is a factor in its policies of exclusiveness, but says that 42 U.S.C. § 1981 cannot be used to compel admission of a black child to a white school of the type it represents, and prays an adjudication to that effect.

The actions were conslidated and tried on July 16 and 17, 1973.

No determination was made prior to trial that the actions might be maintained as a class action, either as asserted by the plaintiff or the intervenor; and the Court does not feel it should be so maintained. Accordingly, the decision is only binding on the named plaintiffs, the named defendants, and those schools which actually comprise the intervenor.

42 U.S.C. § 1981 reads as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

If read literally the act covers these plaintiffs, who have been denied their right to make a contract with the defendants because they are not white. That it is to be read literally is no longer open to question. In considering 42 U.S.C. §

1982, the Supreme Court has said that ". . . Congress meant exactly what it said." *Jones v. Mayer Co.*, 392 U.S. 409, 422 (1968). Interrelated as § 1981 and § 1982 are, there is no reason to think Congress meant any less when it enacted § 1981. *Tillman v. Wheaton-Haven Recreation Ass'n.*, 41 U.S.L.W. 4311 (February 27, 1973). The purpose of both is to prohibit all racial discrimination against non-whites,[3] whether that infringement be "by 'State or local law,'" or "by 'custom, or prejudice.'" *Jones v. Mayer Co., supra,* at 423. In other words, no state action is necessary to invoke § 1981.

Although both schools claim to have strictly established criteria for enrollment, the end result of their admission policies as applied to both Colin and Michael evidences no "plan or purpose of exclusiveness" for selection of students *"other than race."* [Emphasis added.] *Sullivan v. Little Hunting Park,* 396 U.S. 229, 236 (1969). This disposes of the argument that these were "truly private" schools since the Opportunity to attend these schools was open to every white child. *Tillman,* at 4313 and 4314. It is difficult to accept the defendants 'argument that the plaintiffs may not have been qualified to meet their schools' high standards. This answer is certainly unavailing with regard to the day camp or nursery and is suspect insofar as the first grade is

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[3] The analogy to all black academies, all Chinese schools, and all rabbinical schools is inapposite. These institutions don't fall within the proscription of § 1981. Whatever else may be said of their policies, those institutions are free to discriminate against whites, or against other non-whites if whites are similarly discriminated against, without running afoul of § 1981.

concerned since Colin Gonzales, because of his race, was never given the opportunity to demonstrate that he was qualified.[4]

Intervenor proffered testimony which would establish:

1. That intervenor parents act rationally in holding a belief that segregation is desirable in education in light of the performance record of these schools and current scientific theory; and

2. That the intervenor schools are academically successful beyond the national public school average and have low disciplinary problems, both of which are causally related to segregated policies.

The Court finds this testimony to be irrelevant to the issue in these actions, feeling that such testimony, as a defense to outlawed policies of segregation, embodies a concept rejected in *Brown v. Board of Education, supra.*

Intervenor has seized on certain dicta of the Supreme Court in *Norwood v. Harrison*, 41 U.S.L.W. 5094 (June 25, 1973), which states that "private bias" is not proscribed by the Constitution and that "private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment. . . ." Comforting as these words may be to the defendants out of context, it must be pointed out that § 1981 was not there involved; that *Jones v. Mayer Co.*, was cited to the contrary as an

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[4] The defendant Fairfax-Brewster points to page 2 of its handbook (Def's Ex. 2) to indicate that Colin Gonzales should have submitted a report card and other pertinent records from his previous school, the omission of which was a ground for his rejection. The same page of the handbook provides for Entrance Examination if previous scholastic records are inadequate. Colin was denied the opportunity to take this examination since he was never told that his scholastic record inadequacy was the reason for his rejection.

example of private discrimination made unlawful by Congress; and that the opinion specifically points out that "[t]his case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race or religion. . . ." *Norwood v. Harrison*, at 5095. Moreover, although perhaps not legally significant, as a practical consideration, it is inconceivable that the opinion in the case would have attained the indicated degree of unanimity if it stood for the proposition urged by the intervenor. Accordingly, the Court feels *Norwood* is not authority for that proposition.

While no relief is sought under 42 U.S.C. § 2000a, *et seq.*, it seems appropriate to point out that, in the Court's view, this act is not a limitation on § 1981, and consequently the exemption of 42 U.S.C. § 2000a(e) for private establishments does not apply in this case. Moreover, as indicated before, Sullivan v. Little Hunting Park has abolished traditional notions of what is "private" insofar as these types of actions are concerned.

Plaintiffs are accordingly entitled to the relief requested, namely:

A. An adjudication that the policies with respect to the admission of students to defendants' day camp and school, of discriminating on the basis of race or color, are a violation of 42 U.S.C. § 1981.

B. A permanent injunction against the defendants and intervenor, their agents and those acting in concert with them, prohibiting them from following the policies described in Paragraph A.

C. An award of compensatory[5] damages for the embarrassment, humiliation and mental anguish which the Court finds to have been suffered by the plaintiffs as follows:

1. In favor of Colin Gonzales:	
(a) Against Fairfax-Brewster School	$2,000
(b) Against Bobbe's School	500
2. In favor of Michael McCrary against Bobbe's School	1,000
3. In favor of Sandra McCrary and Curtis L. McCrary against Bobbe's School	2,000

D. An award of attorney's fees as follows:

1. Against Fairfax-Brewster School	$1,000
2. Against Bobbe's School	1,000

E. Their costs.

And it is so ordered.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
July 27th, 1973

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[5] Punitive damages are not awarded. While the defendants' acts have here been declared improper, insofar as the Court can determine similar acts have not heretofore been so declared. Accordingly, the defendants cannot be said to have acted recklessly or wilfully in disregard of clear existing law.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

MICHAEL C. McCRARY, *et al.*, *Plaintiffs,*	
v.	**CIVIL ACTION No. 495-72-A**
RUSSELL L. RUNYON, *et al.*, d/b/a BOBBE'S SCHOOL, *Defendants,*	
and	
SOUTHERN INDEPENDENT SCHOOL ASSOCIATION, *Intervenor-Defendant.*	

[Filed September 24, 1973]

SUPPLEMENTAL TO MEMORANDUM OPINION AND ORDER DATED JULY 27, 1973

1. The counterclaim of intervenor is dismissed for failure to state a cause of action.

2. The proffered testimony of intervenor described on page 8 of said Memorandum Opinion was admitted into evidence subject to the Court's reserved ruling on relevance.

3. Intervenor shall furnish the Clerk with the names of the schools in the component associations of the Southern Independent School Association within 30 days.

And it is so ordered.

/s/ ALBERT V. BRYAN, JR.
Albert V. Bryan, Jr.
United States District Judge

A True Copy, Teste:
W. Farley Powers, Jr., Clerk

By /s/ John Edmond Cox
John Edmond Cox
Deputy Clerk

Alexandria, Virginia
September 24, 1973